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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

HOOPA VALLEY TRIBE, Plaintiff, v. U.S. BUREAU OF RECLAMATION, et al., Defendants, and KLAMATH WATER USERS ASSOCIATION, et al., Defendant-Intervenors.	Case No. 3:16-cv-04294-WHO **FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO LIMIT REVIEW TO THE ADMINISTRATIVE RECORD AND TO STRIKE PLAINTIFF'S EXTRA-RECORD EVIDENCE** **Date:** January 27, 2017 **Time:** 9:00 a.m. **Judge:** Honorable William H. Orrick **Location:** Courtroom 2, 17th Floor

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INTRODUCTION

Federal Defendants filed their Motion to Limit Review to the Administrative Record and Motion to Strike Plaintiff's Extra-Record Evidence ("Motion to Limit Review"), ECF No. 88, demonstrating that both the standard and scope of judicial review provided in the APA, 5 U.S.C. § 706, apply to ESA citizen suit claims like the one at issue in Plaintiff's Motion for Partial Summary Judgment, ECF No. 69. Plaintiff asserts that the federal agencies' actions should be reviewed based on a set of extra-record documents and declarations attached to its motion, without regard to whether such information was available to or considered by the agencies. Plaintiff is incorrect.

Plaintiff filed a Motion for Partial Summary Judgment arguing that the National Marine Fisheries Service ("NMFS") violated the Administrative Procedure Act ("APA") and that the United States Bureau of Reclamation ("Reclamation") violated the Endangered Species Act ("ESA") by failing to reinitiate formal consultation on the impact of Klamath Project operations on the Southern Oregon/Northern California Coast Evolutionarily Significant Unit of coho salmon, a species listed as threatened under the ESA. ECF No. 69 at 9, 10.[1] Federal Defendants oppose that motion.

In opposing the Federal Defendants' Motion to Limit Review, Plaintiff concedes that the APA's "arbitrary and capricious" *standard* of review applies to its citizen suit claim, however, it nonetheless contends that the APA's *scope* of review, requiring judicial review based on a record, does not. That is incorrect. The two concepts apply in tandem: the "arbitrary and capricious" standard of review "[has] consistently been associated with a review limited to the administrative record." *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963). Further, Plaintiff is wrong to argue that even its purported APA claim against NMFS is not subject to administrative record review because the claim involves an agency's alleged failure to act. The APA does not remove the administrative record requirement for such cases, and the Ninth Circuit has applied

[1] As Federal Defendants have demonstrated, Plaintiff cannot state a claim for relief against NMFS for failure to reinitiate consultation, either under the APA or the ESA. ECF No. 33 at 8; ECF No. 60 at 2.

record review principles in failure to act cases. Plaintiff's effort to rewrite the APA and ignore settled precedent must be rejected.

SCOPE OF RELIEF REQUESTED

Federal Defendants' Motion to Limit Review seeks only to ensure that the ESA and APA claims raised in Plaintiff's Motion for Partial Summary Judgment are resolved upon the excerpts of the administrative records filed with the Court on January 6, 2017, in accordance with binding case law.[2] ECF No. 91. As expressed in our previous motion, Federal Defendants do not seek to constrain Plaintiff's ability to prove standing or harm as they attempt to seek an injunction. But Plaintiff's extra-record evidence—particularly the Declarations of Joshua Strange and Sean Ledwin, ECF Nos. 70, 71, and their accompanying extra-record exhibits[3]—contain information that could improperly influence the Court's understanding and analysis of the issues in contravention of the appropriate scope of review.[4]

In ruling upon the Motion for Partial Summary Judgment, the Court must look to the administrative record underlying the agencies' decision, and not extra-record documents, to determine key facts. For instance, Plaintiff claims that the federal agencies have not reinitiated formal consultation on the Klamath Project operations, citing to testimony from Sean Ledwin for support. ECF No. 69 at 10, 14; ECF No. 71 at ¶ 12 ("To my knowledge, neither NMFS nor BOR have yet reinitiated formal consultation to address effects of the Klamath Project . . . ."); ECF No. 71, Ex. B at ¶ 24 ("I have participated in the ongoing discussions and meetings with [Federal Defendants] . . . and have not learned of any commitment by the federal agencies to reinitiate formal consultation or prepare a new Biological Opinion in advance of 2017 Project operations.").

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[2] Federal Defendants, at this time, are only addressing the use of extra-record evidence relating to the claim at issue in Plaintiff's Motion for Partial Summary Judgment. However, all of Plaintiff's claims are subject to review based upon the administrative record.

[3] Exhibits C and D of the Ledwin Declaration have been included in the excerpts of the administrative records and therefore do not need to be stricken.

[4] For instance, Plaintiff inappropriately relies upon these declarations and exhibits to prove the merits of its claim on summary judgment, such as providing factual and scientific information regarding the salmon and the effects of the Klamath Project's operations, and not solely with regard to its remedy request. ECF No. 69 at 4–9.

However, Reclamation has filed an excerpt of its administrative record, which includes a letter and other documents demonstrating that it has in fact reinitiated formal consultation with NMFS and the U.S. Fish and Wildlife Service. AR0001-08. The Court should assess what actions the agencies have taken or have committed to take in the future based on the certified excerpts of the administrative records, which is the official record of the agencies' decisions and provides the bases for those decisions. Additionally, should the Court need to consider whether an agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," the standard that Plaintiff admits applies to ESA and APA claims, ECF No. 69 at 9, the Court's determination must be based upon the information that was before the agencies.

Due to the rapid filing of Plaintiff's Motion for Partial Summary Judgment while Federal Defendants' Motion to Dismiss for lack of subject matter jurisdiction was pending, ECF No. 33, the agencies have not yet had time to compile and certify the complete administrative records. However, Federal Defendants have quickly compiled certified excerpts of the administrative records to guide the Court's review of the single claim at issue in Plaintiff's motion. ECF No. 45.[5] Federal Defendants have filed excerpts instead of complete records because of time constraints and the need to address only one procedural claim at this stage in the proceedings. Of course, the agencies will compile and produce their complete certified records once this litigation is postured to proceed in the normal course.

Federal Defendants respectfully request that the Court limit its review on the merits of Plaintiff's reinitiation claim to the excerpts of the administrative records. Federal Defendants further request that this Court strike the Declarations of Joshua Strange and Sean Ledwin, as well as the supporting exhibits, strike Plaintiff's Motion for Partial Summary Judgment in full, and order Plaintiff to re-file its motion without reference to or reliance on extra-record materials. In the alternative, Federal Defendants move to strike the declarations and exhibits listed above and

[5] Federal Defendants also filed rebuttal declarations in support of their Opposition to the Motion for Partial Summary Judgment. These declarations are necessary to respond to Plaintiff's extra-record declarations if the Court denies this motion and/or to provide key information regarding the scope of any potential injunction in this case.

any portions of Plaintiff's Motion for Partial Summary Judgment that cite to or rely upon the extra-record evidence.

ARGUMENT

I. The Scope And Standard Of Review Provided In The APA Are Necessarily And Inextricably Intertwined.

Plaintiff asserts that ESA cases are subject to the APA's standard of review, but not the APA's scope of review. However, Plaintiff fails to recognize that the APA's standard and scope of review are inextricably related, as confirmed by the language of the APA, Supreme Court precedent, and decades of Ninth Circuit case law.

Unless a statute specifies otherwise, a court's review of federal agencies' administrative actions is limited to the APA's "arbitrary and capricious" standard of review and "confined to the administrative record." *Carlo Bianchi & Co.*, 373 U.S. at 715. Although *Carlo Bianchi* was not an ESA case, as Plaintiff points out, ECF No. 90 at 12, it established the general principle for review of administrative agency actions under any statute that does not prescribe its own standard and scope of review. This principle has been followed by the Supreme Court and the Ninth Circuit in subsequent cases. *See Dickinson v. Zurko*, 527 U.S. 150, 154–55 (1999) ("[T]he finding constitutes 'agency action.' *See* 5 U.S.C. § 701 (defining 'agency' as an 'authority of the Government of the United States'); § 706 (applying APA 'Scope of review' provisions to 'agency action'). Hence a reviewing court must apply the APA's court/agency review standards in the absence of an exception."); *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (even when a claim is not brought under the APA, "review of administrative decisions is to be confined to 'consideration of the decision of the agency . . . and of the evidence on which it was based.'" (quoting *Carlo Bianchi & Co.*, 373 U.S. at 714–15)); *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1193–95 (9th Cir. 2000) (applying the APA standard and scope of review where the statute did not "expressly" indicate a contrary intent). Plaintiff cannot dispute that the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(1)(A), lacks an internal standard or

scope of review. Therefore, Supreme Court precedent requires this court to employ the APA's standard and scope of review (*i.e.*, limit its review to the administrative record).

Even if precedent allowed the Court to separate the standard and scope of review in Section 706, which it does not, doing so would be illogical. The arbitrary and capricious standard of review "ha[s] frequently been used by Congress and ha[s] consistently been associated with a review limited to the administrative record." *Carlo Bianchi & Co.*, 373 U.S. at 715. Accordingly, the APA places both requirements in the same section and specifies that "[i]n making the . . . determination" of whether an action is arbitrary, capricious, or otherwise not in accordance with the law, "the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. Under the deferential APA review standard, the reviewing Court does not sit as a factfinder in the first instance. Rather, it sits as an appellate tribunal determining whether the facts found by the agency and the conclusions reached are supported by the record and in accordance with law. As the Ninth Circuit has noted, in conducting review of agency action:

> [T]here are no disputed facts that the district court must resolve. That court is not required to resolve any facts in a review of an administrative proceeding. Certainly, there may be issues of fact before the administrative agency. However, the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.

Occidental Eng'g Co. v. INS, 753 F.2d 766, 769 (9th Cir. 1985).

For instance, courts may find an agency action to be arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This review inherently relies upon the information that was considered or relied upon by the agency. If courts go beyond the administrative record, it becomes challenging, if not impossible, to properly apply the proper standard of review. *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980) ("When a reviewing court considers evidence that was

not before the agency, it inevitably leads the reviewing court to substitute its judgment for that of the agency."); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) ("*Jewell*") ("There is a danger when a reviewing court goes beyond the record before the agency.").

The Ninth Circuit has repeatedly held that Section 706 of the APA governs the resolution of ESA citizen suit claims in particular. *See, e.g.*, *Vill. of False Pass v. Clark*, 733 F.2d 605, 609 (9th Cir. 1984); *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082, 1086 (9th Cir. 2004); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1205–06 (9th Cir. 2004). In none of those cases did the Ninth Circuit distinguish between the standard of review portion of Section 706 and the scope of review portion in the same section—and yet Plaintiff asks this Court to read that distinction into the entire line of precedent without any legal basis for doing so and despite contrary Supreme Court precedent. Further, Plaintiff does not point to any Ninth Circuit cases that severed the standard and scope of review when reviewing ESA claims. To the contrary, the Ninth Circuit has consistently relied upon the administrative record to review ESA cases. *See Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) ("We may not consider information outside of the administrative record" for either APA or ESA citizen suit claims); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943–44, 944 n.21 (9th Cir. 2006) (affirming the district court's decision to strike extra-record evidence relevant to ESA claims "because post-decision information may not be advanced as a new rationalization . . . for attacking an agency's decision" and striking additional extra-record documents because they were "not part of the administrative record and do not come within one of our exceptions to the rule excluding such materials"); *Ctr. for Biological Diversity v. Badgley*, 335 F.3d 1097, 1100–01 (9th Cir. 2003) (looking to the "administrative record" when holding that NMFS' decision not to list a species under the ESA "was amply supported by evidence in the record" and was not arbitrary or capricious).

Supreme Court and Ninth Circuit precedent make clear that ESA claims must be reviewed upon the administrative record, in accordance with both the APA's standard and scope of review.

II. *Kraayenbrink* and *Washington Toxics* Do Not Silently Overrule Controlling Precedent.

Plaintiff erroneously claims that *Washington Toxics Coalition v. EPA*, 413 F.3d 1024 (9th Cir. 2005), and *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 497 (9th Cir. 2011), overturned Supreme Court and Ninth Circuit precedent establishing that the APA's standard and scope of review apply to ESA claims.

In *Washington Toxics*, the Ninth Circuit never opined on the appropriate scope of review in ESA cases. Instead, it held that "suits to compel agencies to comply with the substantive provisions of the ESA arise under the ESA citizen suit provision, and not the APA" and therefore are not required to challenge "final agency action" in accordance with 5 U.S.C. § 704. 413 F.3d at 1034. Federal Defendants do not contest that suits authorized under the ESA citizen suit provision arise under the ESA. However, that holding is a far cry from overturning decades of precedent requiring the Court to review ESA cases regarding agency action in accordance with the standards in APA Section 706.[6] Rather than infer that the Ninth Circuit intended to overrule clear precedent, *Washington Toxics* should be read only to limit the applicability of APA Section 704's "final agency action" requirement.[7]

In *Kraayenbrink*, the Court cited only *Washington Toxics* to support its conclusion that limited extra-record evidence could be considered in that case. 632 F.3d at 497. Importantly, in *Kraayenbrink*, both the Ninth Circuit and the district court reviewed an administrative record,

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[6] In fact, the only mention of the scope of review in *Washington Toxics* is in the "Factual and Procedural Background" section, where the Ninth Circuit summarized the intervenors' arguments before the district court. 413 F.3d at 1030. The Ninth Circuit never ruled upon the issue.

[7] Moreover, *Washington Toxics* is no longer consistent with Supreme Court precedent. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife,* 551 U.S. 644 (2007). In *Home Builders,* the Supreme Court evaluated whether the EPA had complied with ESA Section 7(a)(2). In doing so, the Court unambiguously imported the APA, including the finality requirement, 5 U.S.C. § 704, into its ESA evaluation. 551 U.S. at 659 ("The federal courts ordinarily are empowered to review only an agency's *final* action, see 5 U.S.C. § 704"); *see also id.* at 657 (applying the APA's "arbitrary and capricious" standard of review to EPA permitting decision); *id.* at 658 (suggesting the appropriate APA remedy would have been to remand to the agency); *id.* (recognizing the APA's harmless error under 5 U.S.C. § 706). This instruction from the Supreme Court leaves no doubt that claims challenging an action agency's compliance with the ESA must comply with the APA's standard and scope of review.

which they then supplemented with limited "extra-record" material. *Id.* at 497; *W. Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302, 1322–23 (D. Id. 2008) ("[T]he material cited above by the Court is all within the Administrative Record and was before the BLM when it made its decision not to consult. Examining only this Administrative Record material under the broad definition of 'may affect,' the Court finds that the BLM's failure to consult was arbitrary and capricious."). The Ninth Circuit characterized the extra-record materials as "relevant expert analysis" from "agency experts," including state and federal employees, that "the [Bureau of Land Management] failed to consider." *Kraayenbrink*, 632 F.3d at 498. The admission of such evidence appears to be consistent with the ordinary APA rule allowing for limited supplementation of the record where the proffered extra-record evidence is necessary to identify specific issues the agency may have ignored. Under this interpretation, *Kraayenbrink* does not silently overrule 30 years of Ninth Circuit precedent that it does not even cite, create a Circuit split, and contravene the Supreme Court.

Some litigants' efforts to advocate for an expansive interpretation of the language used in *Kraayenbrink* and *Washington Toxics* has resulted in confusion in the lower courts. Plaintiff cites district court cases which have purported to follow *Kraayenbrink* and *Washington Toxics* by removing the record review requirement from ESA cases. ECF No. 90 at 8–9. However, numerous district court opinions have reached the opposite conclusion, and continued to apply both the standard and scope of review in APA Section 706 to ESA claims. *See, e.g.*, *Shearwater v. Ashe*, No. 14–CV–02830–LHK, 2015 WL 4747881, at *10 (N.D. Cal. Aug. 11, 2015);[8] *Conservation Cong. v. U.S. Forest Serv.*, No. CIV. S-13-832 LKK/DAD, 2013 WL 4829320, at *1 n.3 (E.D. Cal. Sept. 6, 2013); *Pac. Rivers Council v. Shepard*, No. 03:11-CV-442-HU, 2012 WL 950032, at

[8] Plaintiff asserts that the failure to consult claim in *Shearwater* should have been considered under the APA instead of the ESA citizen suit provision. The *Shearwater* court, however, never stated that the claim arose under the APA and referred to it as an ESA claim. Regardless of whether the claim properly arose under the APA or the ESA, the court clearly found the distinction between the two to be immaterial, because both are governed by the same APA standard and scope of review. 2015 WL 4747881, at *10 ("ESA claims [are reviewed under the APA standards] whether they are brought under the citizen-suit provision of the ESA or . . . under the APA." (internal citations and quotation marks omitted)).

*3 (D. Or. Mar. 20, 2012) ("Under APA's scope-of-review provision in § 706, a court may 'hold unlawful and set aside agency action' that is 'arbitrary, capricious, or an abuse of discretion' or that is 'otherwise not in accordance with law' based on its 'review [of] the whole record or those parts of it cited by a party.' 5 U.S.C. § 706 . . . . The ESA citizen-suit provision does not provide otherwise. 16 U.S.C. § 1540(g)."); *Olenec v. Nat'l Marine Fisheries Serv.*, 765 F. Supp. 2d 1277, 1284, 1286 (D. Or. 2011); *cf. Sierra Club v. McLerran*, No. C11-1759RSL, 2012 WL 5449681, at *2 (W.D. Wash. Nov. 6, 2012) ("In both *Kraayenbrink* and *Washington Toxics*, the issue before the Ninth Circuit was whether the district court had properly allowed the parties to supplement the record with expert opinions and studies. While the Ninth Circuit ratified the district courts' use of discretion in those cases to supplement the record, it is a far cry to state that those cases require a district court to engage in *de novo* review of the record, or that the APA's standards are inapt guidelines." (internal citations omitted)).

Additionally, whatever confusion *Washington Toxics* and *Kraayenbrink* sowed, *Karuk Tribe of California v. United States Forest Service* has definitively dispelled by affirming that ESA citizen suit claims are subject to APA record review principles. 681 F.3d 1006, 1017 (9th Cir. 2012) (en banc), *cert denied*, *New 49'ers, Inc. v. Karuk Tribe of Cal.*, 133 S. Ct. 1579 (2013). In considering an ESA citizen suit claim challenging an agency's failure to consult under Section 7 of the ESA, the Ninth Circuit in *Karuk Tribe* clearly stated "this is a record review case" and that summary judgment could be granted to either party "based upon [the Court's] review of the administrative record." 681 F.3d at 1017; *id.* ("An agency's compliance with the ESA is reviewed under the Administrative Procedure Act."). *Karuk Tribe* was an *en banc* decision and therefore provides the controlling law of the circuit even if it contradicts prior panel decisions, such as *Kraayenbrink* and *Washington Toxics*. *United States v. Easterday*, 564 F.3d 1004, 1010 (9th Cir. 2008) ("[A] panel opinion is binding on subsequent panels unless and until overruled by an en banc decision of this circuit."). Contrary to Plaintiff's assertions, ECF No. 90 at 9, there is no requirement that the *en banc* court explicitly name the cases that will be overturned by its decision. Instead, the Ninth Circuit has explained:

> In *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc), we held that "where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority," *id.* at 893, three-judge panels and district courts "should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled," *id.* at 900.

Barapind v. Enomoto, 400 F.3d 744, 751 n.8 (9th Cir. 2005).

Plaintiff further argues that *Karuk Tribe* "say[s] nothing about the scope of review," ECF No. 90 at 17, ignoring the fact that *Karuk Tribe* held that "this is a record review case" and that review had to be based on "the administrative record." 681 F.3d at 1017. *Karuk Tribe* expressly stated the legal standard and scope of review that applied to the ESA claim before it, and proceeded to analyze the claim in accordance with those principles. Both in *Karuk Tribe* and generally the standard and scope of review are "necessary" to the court's decision and not dicta. *See Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1224 (9th Cir. 2000) (parties failing to cite or discuss the correct legal standard "did not relieve the district court of the duty to apply the correct legal standard" and the district court erred by applying the wrong standard).

Additionally, the scope of review was at issue in *Karuk Tribe*. Both the trial court and original panel decision in *Karuk Tribe* addressed the admissibility of extra-record evidence and applied the exact same rule Federal Defendants espouse here: that such evidence is admissible only under the limited APA exceptions. *Karuk Tribe v. U.S. Forest Serv.*, 640 F.3d 979, 983–84 n.3 (9th Cir. 2011); *Karuk Tribe v. U.S. Forest Serv.*, 379 F. Supp. 2d 1071, 1087, 1090 (N.D. Cal. 2005) (declining to admit "technical testimony" intervenors offered in order to "illuminate highly technical issues," demonstrate the adequacy of the agency's consultation, or show "relevant factors" assertedly not documented in the record). Both the trial court and original Ninth Circuit panel expressly declined to admit the intervenors' proffered extra-record evidence about the lack of impacts from suction dredge mining because it went to the merits of the agency's decision and was not available at the time the agency made its decision, among other rationales. *Id.* In fact, the briefing considered by the *en banc* Court contained defendant-intervenors' request for the Court to consider extra-record evidence excluded by the district court. *See* 9th Circuit Case No. 05-16801, ECF No. 36 at 42 (Brief of Appellees Raymond W. Koons and The New 49'ers, Inc.).

Faced with this dispute, the *en banc* opinion analyzed whether the mining activity might affect listed species based *solely* on the administrative record and without considering the intervenors' proffered extra-record evidence. *Karuk Tribe*, 681 F.3d at 1028. In sum, the scope of review in *Karuk Tribe* was disputed, considered, clearly resolved, and necessary to the Court's analysis; it was a legal holding binding on future decisions.

Finally, Plaintiff fails to account for the fact that Ninth Circuit decisions both before and after *Karuk Tribe* have not treated *Kraayenbrink* or *Washington Toxics* as changing the long-standing rule that ESA cases are reviewed on an administrative record. *See Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 674 (9th Cir. 2016) ("We hold that on the basis of the administrative record, NMFS's listing decision is reasonable."); *Bldg. Indus. Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 792 F.3d 1027, 1032, 1034 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 328 (2016) (reviewing ESA claims on the administrative record); *Jewell*, 747 F.3d at 601–02 ("Neither the ESA nor NEPA supply a separate standard for our review, so we review claims under these Acts under the standards of the APA" and review is limited to "the administrative record already in existence.");[9] *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 990 (9th Cir. 2014) ("*Locke*") (reversing a district court for allowing extra-record evidence to inform its decision on APA and ESA claims); *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1024, 1024 n.2 (9th Cir. 2011) (reviewing "the record before the agency" and citing Section 706 for the proposition that "we may consider only the record that was before the agency at the time the challenged decision was made").[10]

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[9] Plaintiff asserts that the claims in *Jewell* arose under the APA, and not the ESA citizen suit provision. ECF No. 90 at 11. However, the case included claims under the ESA as well as the APA. *See Jewell*, 747 F.3d at 640 (deciding the ESA citizen suit claim based on the same analysis and scope of review used to decide a related APA claim).

[10] For example, the claims in *Greater Yellowstone Coalition* were both allegations of ESA citizen suit violations (failure to use the best available science and inadequate regulatory mechanism) and allegations of APA violations. In that case, which notably post-dates *Kraayenbrink,* the Ninth Circuit very clearly adhered to APA record review principles with both the ESA citizen suit claims and APA claims, and rejected the notion that there is a distinction between the standard and scope of review as the Plaintiff suggests here. *See* 665 F.3d at 1024 n.2 ("Of course, we cannot and do not consider any reports or studies that have been compiled since the Rule was published in March

If the Court finds the impact of *Kraayenbrink* or *Washington Toxics* to be uncertain, these Ninth Circuit opinions and the *en banc* decision in *Karuk Tribe*—as opposed to the handful of district court decisions cited by Plaintiff—should resolve that uncertainty in favor of the long-standing rule that the APA standard and scope of review cannot be separated.

III. Review Under the ESA Or APA Is Limited To The Administrative Record Regardless Of Whether Plaintiff Challenges Agency Action Or Inaction.

Finally, Plaintiff asserts that failure to act claims, whether challenged under the ESA citizen suit provision or the APA, are not reviewed on an administrative record. Plaintiff is incorrect. The APA expressly requires actions to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), to be reviewed upon the administrative record, *id.* § 706.

As support for its contention, Plaintiff first points to the fact that *Kraayenbrink* and *Washington Toxics* involved failure to consult claims under the ESA, ECF No. 90 at 7; however, neither case mentions the type of ESA claim in their brief respective discussions of the applicability of the APA standards or their consideration of supplementing the administrative record. Thus, Plaintiff's asserted distinction between action and inaction cases has no basis in precedent.

Plaintiff next cites *Friends of the Clearwater v. Dombeck*, 222 F.3d 552 (9th Cir. 2000), and *San Francisco BayKeeper v. Whitman*, 297 F.3d 877 (9th Cir. 2002), for the proposition that no record exists where the agency has failed to act, even under the APA. But Plaintiff ignores that both of these cases reviewed failure to act cases *based upon an administrative record*, and only permitted limited supplementation by the agencies for events that occurred after the record had been compiled. *See San Francisco BayKeeper*, 297 F.3d at 886; *Friends of the Clearwater*, 222 F.3d at 560–61. Both in the cases cited by Plaintiff and in this case, the administrative record does exist and is available for the Court's consideration, ECF No. 91.

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of 2007. Under the APA, we may consider only the record that was before the agency at the time the challenged decision was made. See 5 U.S.C. § 706.") (citations omitted)

Even in agency inaction cases, it is both possible and mandatory for the court to review the administrative record when evaluating ESA or APA claims. As the *en banc* Ninth Circuit held in *Karuk Tribe*, a failure to act claim under the ESA is a record review case in accordance with APA Section 706. 681 F.3d at 1017.

CONCLUSION

Plaintiff's reliance on extra-record evidence for its ESA and APA claims defies longstanding precedent and should not be permitted.[11] Accordingly, the Court should limit its review of the merits of Plaintiff's failure to reinitiate consultation claim to the excerpts of the administrative records that have been provided. Federal Defendants respectfully request that the Court strike the Declarations of Joshua Strange and Sean Ledwin, as well as the supporting exhibits, strike Plaintiff's Motion for Partial Summary Judgment in full, and order Plaintiff to re-file its motion without reference to or reliance on extra-record materials. In the alternative, Federal Defendants move to strike the declarations and exhibits listed above and any portions of Plaintiff's Motion for Partial Summary Judgment that improperly cite to or rely upon the extra-record evidence.

Dated: January 12, 2016

Respectfully submitted,

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[11] It is true that in an ESA case, as in any other record review case, there are exceptions that allow for the introduction of extra-record evidence. *See Center for Biological Diversity*, 450 F.3d at 943. However, Plaintiff bears the burden of proving the existence of an applicable limited exception permitting consideration of extra-record materials. Here Plaintiff inverts this well-established burden and seeks a blanket exception without making any showing at all. *Id.*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above was electronically filed with the Clerk of Court using CM/ECF. Copies of this document will be served upon interested counsel via the Notices of Electronic Filing that are generated by CM/ECF.

/s/ Coby Howell

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